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No. 92-372

In the Supreme Court of the United States

OCTOBER TERM, 1992

MARY TATARANOWICZ, ET AL., PETITIONERS

v.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in upholding the Secretary of Health and Human Services' interpretation of a transition provision of the Medicare Catastrophic Coverage Repeal Act of 1989, Pub. L. No. 101-234, § 101(b)(1)(C), 103 Stat. 1979.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A30) is reported at 959 F.2d 268. The opinion of the district court (Pet. App. A31-A48) is reported at 753 F. Supp. 978.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 1992. A petition for rehearing was denied on June 1, 1992. Pet. App. A56. The petition for a writ of certiorari was filed on Monday, August 31, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Part A of the Medicare program provides reimbursement for hospital, home health care, and post-hospital extended care services. Extended care services are typically provided in a skilled nursing facility (SNF). Prior to 1989, the Medicare program provided benefits for "post-hospital extended care services for up to 100 days during any spell of illness." 42 U.S.C. 1395d(a)(2)(A) (1982).[1] "Post-hospital extended care services" were defined as extended care services that were furnished to individuals who had been admitted to SNFs within 30 days (with certain exceptions) after a hospital stay of at least three days. 42 U.S.C. 1395x(i) (1982). A "spell of illness" was defined, in pertinent part, as "a period of consecutive days * * * beginning with the first day * * * on which such individual is furnished inpatient hospital services or extended care services * * * and * * * ending with the close of the first period of 60 consecutive days thereafter on each of which he is [not receiving inpatient care]." 42 U.S.C. 1395x(a)(1) (1982).

In 1988, Congress enacted the Medicare Catastrophic Coverage Act (Catastrophic Coverage Act),

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[1] "Extended care services" were defined as an enumerated list of seven medical services performed in a "skilled nursing facility." 42 U.S.C. 1395x(h) (1982). A "skilled nursing facility" was defined as "an institution (or a distinct part of an institution)" that provides, among other things, skilled nursing care and related services. 42 U.S.C. 1395x(j), 1395i-3(a) (Supp. V 1987).

Pub. L. No. 100-360, 102 Stat. 683.[2] The Catastrophic Coverage Act expanded Medicare coverage under Part A in a variety of areas. As relevant here, it expanded coverage for extended care services in SNFs. Section 101 of the Catastrophic Coverage Act redefined the duration of coverage for extended care services to permit payment of benefits for up to 150 days during a calendar year. 102 Stat. 684-685, codified at 42 U.S.C. 1395d(a)(2) (1988). The post-hospital requirement and spell-of-illness limitation were eliminated. *Ibid.*

One year later, Congress repealed the Catastrophic Coverage Act. See Medicare Catastrophic Coverage Repeal Act of 1989 (Repeal Act), Pub. L. No. 101-234, 103 Stat. 1979. In repealing the Catastrophic Coverage Act, Congress intended to "restore the Medicare Program benefit levels to those found in prior law." 135 Cong. Rec. H6584 (daily ed. Oct. 4, 1989) (remarks of Rep. Donnelly).

The Repeal Act became law on December 13, 1989, and was made effective January 1, 1990. 103 Stat. 1980. With respect to extended care services, the Repeal Act reinstated the post-hospital requirement —*i.e.*, the rule that an individual may receive reimbursement for extended care services in an SNF only if the individual was admitted to an SNF within 30 days after a hospital stay of at least three days, 42 U.S.C. 1395x(i) (Supp. II 1990)—as well as the rule

[2] The pertinent provisions of the Catastrophic Coverage Act became effective on January 1, 1989. Pub. L. No. 100-360, § 104(a), 102 Stat. 687-688, as amended by the Family Support Act of 1988, Pub. L. No. 100-485, Tit. VI, § 608(d)(3)(A), 102 Stat. 2413 (1988).

that post-hospital extended care services would be covered for only the first 100 days of any "spell of illness." 42 U.S.C. 1395d(a)(2)(A), 1395d(g), and 1395x (a) (Supp. II 1990).

Congress also enacted special provisions to govern the transition from the one-year regime of the Catastrophic Coverage Act to the less generous regime restored by the Repeal Act. Section 101(b) of the Repeal Act, entitled "Transition Provisions for Medicare Beneficiaries," provided transitional benefits for certain patients, including some who were in SNFs when the Repeal Act became effective at the beginning of 1990. For example, Section 101(b)(1)(A) provided that the "spell of illness" for individuals receiving extended care services in SNFs would be deemed to begin on January 1, 1990; the result was to permit those individuals to obtain up to 100 more days of SNF coverage for that spell of illness, even though they may have had a number of days (perhaps 100 or more) of SNF coverage in 1989 for what would otherwise have been regarded as the same spell of illness. See Repeal Act § 101(b)(1)(A) and (B), 103 Stat. 1979.

The provision at issue in this case, Section 101(b)(1)(C), 103 Stat. 1979-1980, then provided:

> [T]he limitation of coverage of extended care services to post-hospital extended care services shall not apply to an individual receiving such services from a skilled nursing facility during a continuous period beginning before (and including) January 1, 1990, until the end of the period of 30 consecutive days in which the individual is not

provided inpatient hospital services or extended care services[.]

The Health Care Financing Administration (HCFA) in the Department of Health and Human Services perceived at least two possible ways in which to interpret this paragraph. On the one hand, paragraph (C) could be read to apply to all individuals covered by Medicare who were in SNFs on December 31, 1989, and January 1, 1990, even if they were not receiving Medicare benefits for those services on those dates. On the other hand, paragraph (C) could be read to apply only to those individuals who were actually receiving Medicare benefits for covered extended care services on December 31, 1989, and were otherwise eligible to receive benefits on January 1, 1990. HCFA adopted the latter interpretation, finding it more consistent with the "grand-fathering" purposes of the transition provision.[3]

2. Plaintiffs challenged the Secretary's interpretation on behalf of a nationwide class of SNF residents. The district court certified the plaintiff class and concluded that the Secretary's interpre-

[3] HCFA's interpretation was embodied in the Intermediary Manual (the instructions to the fiscal intermediaries that make initial payment determinations on Medicare claims on behalf of the Secretary)—which was published in the *Federal Register* on June 14, 1990, see 55 Fed. Reg. 24,159—and in a transmittal to SNFs. HCFA also instructed all SNF providers to inform Medicare patients who did not appear to meet the criteria for SNF Medicare patients under its interpretation of the transition provision that they had a right to require their SNF provider to submit a demand bill and that they had the right to pursue a claim for benefits through the administrative process. See Pet. App. A9.

tation of the transition provision was invalid because it was inconsistent with what it believed to be the plain language of the statute. Pet. App. A31-A48.[4] The court ordered "that defendant Secretary and his agents are permanently enjoined from enforcing defendant's policy of requiring that individuals have actually received Medicare coverage for services received on December 31, 1989 and January 1, 1990 in order to qualify for transition benefits under the Repeal Act," and further ordered the Secretary to "apply the correct interpretation of the transition provisions of the Repeal Act to all eligible beneficiaries including these plaintiffs and all others similarly situated." *Id.* at A50.

3. The court of appeals reversed. Pet. App. A1-A30. The court agreed with the Secretary that the language of the Repeal Act, considered in light of its context and evident purpose, permitted the interpretation adopted by the Secretary. *Id.* at A14-A18. The court of appeals then examined the legislative history of the Repeal Act and found that it provided further support for the Secretary's interpretation. *Id.* at A18-A23. Concluding that "Congress has not 'spoken directly to the precise question at issue,'" the court of appeals held that the Secretary's interpretation was entitled to deference. *Id.* at A23.[5]

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[4] The district court also rejected the Secretary's argument that the court lacked jurisdiction over the claims of the named plaintiffs and the purported class because of the plaintiffs' failure to meet the presentment and exhaustion requirements of 42 U.S.C. 405(g) and 1395ff. Pet. App. A42-A47.

[5] The court of appeals also held that at least some members of the plaintiff class had satisfied the exhaustion and present-

ARGUMENT

The court of appeals applied settled principles of statutory construction in upholding the Secretary's interpretation of Section 101(b)(1)(C). The court's ruling does not conflict with any decision of this Court or any other court of appeals. Moreover, as petitioners concede (Pet. 10), the question presented in this case has no ongoing significance for the administration of the Medicare program: the transition provision was a one-time exemption from reinstated Medicare requirements that applied on January 1, 1990—nearly three years ago—and expired

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ment requirements of the Medicare statute. Pet. App. A7-A13. In particular, the court ruled that those members of the class who had already presented claims for and had been denied coverage had satisfied the presentment requirement; the court therefore found no need to decide the validity of a class that consisted only of persons who would satisfy the presentment requirement at some time in the future. *Id.* at A7-A9. The court did, however, hold that the class could not properly include individuals who had not presented a claim for coverage and would not do so in the future. *Id.* at A9-A10. Finally, the court ruled that the members of the plaintiff class were not required to exhaust administrative remedies, because exhaustion would be futile. *Id.* at A10-A13.

In our view, the court of appeals erred in its resolution of those threshold issues, because, *inter alia*, the court could not grant relief to individuals who had not presented a claim and exhaustion was not futile because the instruction to SNFs did not bind administrative law judges or the Appeals Council on review of individual claims. *Heckler* v. *Ringer*, 466 U.S. 602, 618-619 & n.11, 620-626 (1984). If the Court were to grant certiorari, we would expect to present those arguments as an alternative ground for affirmance (in whole or in part) of the judgment below.

almost immediately thereafter. Finally, the court of appeals did not err in concluding that the Secretary's construction of the Repeal Act was entitled to deference. Accordingly, review by this Court is not warranted.

1. Petitioners err in contending (Pet. 10-17) that the court of appeals' decision conflicts with principles of statutory construction announced by this Court. The court of appeals did not "ignore the plain statutory language" in deferring to the Secretary's interpretation of the Repeal Act (Pet. 10); rather, the court of appeals concluded that the controlling statutory language is ambiguous, when considered in light of its context and the evident purpose of the statute, and that the Secretary's construction of the statute is a reasonable one.

In asserting that the court of appeals ignored the "plain statutory language" on which they rely, petitioners misapprehend the proper role of a court when faced with the task of construing a statutory provision. Petitioners essentially contend that a court may consider only the particular "statutory phrase" (Pet. 13) that is directly at issue—here, the language of Section 101(b)(1)(C). As this Court's decisions make clear, however, the court of appeals properly declined to read that provision in isolation: "a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context," *King* v. *St. Vincent's Hosp.*, 112 S. Ct. 570, 574 (1991) (citation omitted), and thus "[i]n determining the meaning of the statute, [a court must] look not only to the particular statutory language, but to the design of the statute as a whole and to its object and

policy." *Crandon* v. *United States*, 494 U.S. 152, 158 (1990); see also *Massachusetts* v. *Morash*, 490 U.S. 107, 115 (1989). The court of appeals applied this well-established principle and concluded that the language of the statute is ambiguous, especially when considered in light of its place in the overall statutory scheme.[6]

Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), makes clear that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute," *id.* at 843, that is, whether the agency's construction is "rational and consistent with the statute." *NLRB* v. *United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987). In this case, once the court of appeals had determined that the "plain language" of the statute permitted the Secretary's interpretation (Pet. App.

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[6] Petitioners contend that the Secretary explicitly admitted below "that the statute's plain language and the Petitioners' position are consistent with the legislative scheme." Pet. 16 n.10. That is not an accurate statement of the Secretary's position below. The Secretary has always maintained that there are at least two possible interpretations that emerge from the statutory text. See Gov't C.A. Br. 15-16 ("The Secretary reads the transition provision as permitting at least two interpretations: one, the interpretation ultimately adopted by the district court * * *; or two, the interpretation adopted by [the Secretary]."). The Secretary has always maintained, moreover, that his interpretation is the better one because it takes into account the language and structure of the Repeal Act as a whole and gives proper effect to the grandfathering purposes of the transition provision. *Id.* at 16-17, 20.

A14-A18), *Chevron* compelled it to uphold that interpretation.

In short, the court of appeals employed well-established principles of statutory construction in approving the Secretary's interpretation of the Repeal Act. Contrary to petitioners' contentions, then, this case presents nothing more than a situation-specific application of settled law to the particular question of statutory construction at issue. That question is of rapidly diminishing importance because it involves only the benefit claims of certain Medicare claimants who were actually receiving extended care services from SNF facilities on December 31, 1989, and January 1, 1990.[7] Given the

[7] Indeed, it is open to question whether this particular issue of statutory construction will *ever* arise again. The district court certified a nationwide class that included all individuals who have filed or may in the future file claims for Medicare benefits and who would be affected by the statutory provision at issue. The court of appeals did not disturb that certification order; it eliminated from the class only those individuals who have not filed and will not file a claim. Pet. App. A7-A10. Thus, the court of appeals' decision may well be binding on the entire class of present and future claimants affected by the question at issue here.

At the same time, it is not clear that the class, as limited by the decision below, is all that numerous. Governing regulations require that a claim for Medicare benefits for SNF services furnished in 1990 (when the transition provision at issue was in effect) must have been filed by the end of 1991. 42 C.F.R. 424.44. Although HCFA informs us that it does not have data on the number of claims filed, it seems likely, in light of the notice that SNFs gave to patients stating that Medicare would not cover the services (see Pet. App. A9), that many patients (or those acting on their behalf) declined to pursue the matter

narrowness of the question presented, the lack of a circuit conflict on that question, and the absence of any "special and important reasons" for certiorari (Sup. Ct. R. 10.1), further review is not warranted.

2. In any event, the court of appeals properly deferred to the Secretary's construction of the Repeal Act.

a. Petitioners err in contending (Pet. 11-15) that Section 101(b)(1)(C) of the Repeal Act is susceptible of only one interpretation. That transition provision temporarily suspended reinstatement of the "post-hospital" requirement for certain individuals whose SNF stay continued through the effective date of the Repeal Act. Under Section 101(b)(1)(C), "the limitation of coverage of extended care services to post-hospital extended care services shall not apply to an individual receiving such services from a skilled nursing facility during a continuous period beginning before (and including) January 1, 1990." 103 Stat. 1979. The question is whether this language includes all individuals covered by Medicare who happened to be in an SNF on the operative days, or whether it applies more specifically to individuals who were actually receiving Medicare benefits for those services. In the Secretary's view, the latter interpretation of the transition provision better comports with the structure and purpose of the Repeal Act and its transition provision as a whole.

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further. If so, the class of individuals who would actually realize a concrete benefit if the judgment below were reversed is limited, and the amount of money actually at stake is far less than the hundreds of millions of dollars that petitioners cite (see Pet. 3, 10).

The evident function of Section 101(b) as a whole was to address problems created by the transition from the brief one-year regime of the Catastrophic Coverage Act to the regime of the Repeal Act. Section 101(b)(1)(C) was directed at one of those problems—namely, the unfairness that might otherwise result from the Repeal Act's reinstatement of the post-hospital requirement. Individuals who were actually receiving Medicare benefits for SNF care immediately before the Repeal Act became effective might have originally entered an SNF without satisfying the post-hospital requirement, because at that time the Medicare program (*i.e.*, the Catastrophic Coverage Act) imposed no such requirement. Without an exemption from the newly-reinstated post-hospital requirement, those individuals—and only those individuals—would have faced an abrupt *termination* of their Medicare benefits on January 1, 1990.

Section 101(b)(1)(C), as part of a provision explicitly designed to ease the transition from the Catastrophic Coverage Act to the Repeal Act, was obviously intended to avoid that unfair result. Thus, Section 101(b)(1)(C) serves as a "grandfathering" provision that prevents immediate termination of benefits to those individuals who were receiving benefits under prior law. The Secretary simply read Section 101(b)(1)(C) in keeping with its "grandfathering" function and concluded that it exempted from the newly reinstated post-hospital requirement only those individuals whose SNF stay was being paid for by Medicare on December 31, 1989, because only those

individuals otherwise faced termination of benefits once the Repeal Act took effect.

In contrast, those individuals covered by the Medicare program who were in SNFs on December 31, 1989, but had already exhausted their 150 days of annual SNF coverage before that date, had no comparable need for an exemption from the newly reinstated post-hospital requirement, because they were not receiving Medicare benefits for their SNF care at the time the Repeal Act took effect. Rather, those individuals were already paying for their SNF stay through some means other than Medicare, and implementation of the Repeal Act therefore would not have caused the premature termination of their benefits. Because the Repeal Act's reinstatement of the post-hospital requirement could not lead to an abrupt loss of Medicare benefits for those individuals —they had already stopped receiving Medicare benefits under the Catastrophic Coverage Act —there was no need to afford them "grandfather" protection under Section 101(b)(1)(C). See Pet. App. A16-A18.[8]

b. Petitioners err in contending (Pet. 17) that the court of appeals improperly looked to legislative history to override the plain meaning of the stat-

[8] As the court of appeals pointed out (Pet. App. A16), the title of Section 101(b)—"Transition Provisions for Medicare Beneficiaries"—supports this interpretation, because it indicates that the Section's coverage is tied to the receipt of Medicare *benefits*, not the receipt of a particular type of services. Contrary to petitioners' contention (Pet. 18), the title of a statutory provision is a proper source of guidance in construing its terms. *INS* v. *National Center for Immigrants' Rights, Inc.*, 112 S. Ct. 551, 556 (1991).

ute. The court turned to the legislative history of the Repeal Act only after it had first concluded that the statute was reasonably susceptible of more than one interpretation. Thus, after indicating that the Secretary's interpretation was not inconsistent with the plain language of the statute, the court of appeals examined the legislative history in order to see what further light could be shed on the meaning of the statute. That approach, of course, is perfectly consistent with the teachings of this Court. See, *e.g.*, *Toibb* v. *Radloff*, 111 S. Ct. 2197, 2200 (1991) ("a court appropriately may refer to a statute's legislative history to resolve statutory ambiguity"); *Patterson* v. *Shumate*, 112 S. Ct. 2242, 2248 (1992) (same).

In examining the scant legislative history identified as relevant by the parties and the district court, the court of appeals determined that it provided further support for the Secretary's interpretation. The court observed, for example, that the legislative history expressed an intention to hold harmless a beneficiary who "is receiving benefits," 135 Cong. Rec. H5125 (daily ed. Aug. 4, 1989) (Rep. Donnelly), and to "accomplish repeal in a manner that is not disruptive to individuals currently receiving benefits," *id.* at S12,882 (daily ed. Oct. 6, 1989) (Sen. Roth). See Pet. App. A19-A21. It also pointed out that the estimate of the transition provision's financial impact prepared by the Congressional Budget Office conformed to the Secretary's interpretation of the provision's scope. *Id.* at A21-A23. The court of appeals correctly concluded that this legislative history supported the Secretary's interpretation of the relevant statutory provision. That approach to

statutory construction is entirely in keeping with this Court's decisions. Accordingly, no further review is required.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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